United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2055

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THOMAS PALERMO, et ano.,

Plaintiffs-Petitioners-Appellants,

-against-

MACKELL, LUDWIG, et al.,

Defendants-Appellees.

76-2055

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BRIEF FOR STATE DEFENDANTS-APPELLEES

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BRIEF FOR STATE
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Statement

This brief is submitted on behalf of State defendants-appellees on a cross-appeal by plaintiff-petitioner Palermo* seeking to have the dismissal (in 1971) of his amended civil rights complaint against former Queens County prosecutors Mackell and Ludwig reversed and the case set down for trial.

The procedural history and facts of the case have already been set forth in the State's first brief.

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* As of this typing, the Attorney General has not yet received a brief for Saltzman on the cross-appeal.

ARGUMENT

THE AMENDED COMPLAINT WAS PROPERLY DISMISSED BY THE DISTRICT COURT IN 1971; MACKELL AND LUDWIG ARE IMMUNE FROM SUIT.

In the conclusion to Palermo's brief dated July 14, 1976, it is stated that the District Court's dismissal of the amended complaint as against Ludwig and Mackell should be reversed and the case set down for trial. Accordingly, the Attorney General is treating Palermo's brief as constituting both his response to the Attorney General's appeal from the granting of the writ and his cross-appeal on the dismissal of the amended complaint against Mackell and Ludwig.

Palermo's only argument (if it can be called such) in support of his conclusion that the dismissal of the complaint against Mackell and Ludwig* should be reversed is contained in four conclusory words in the last sentence of Palermo's brief: "[t]heir conduct was actionable..." Palermo's complete failure to brief the issue supports a conclusion that he is making the argument pro forma and does not take the claim seriously. In any event, the claim is totally devoid of merit.

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* Palermo apparently does not make this claim as against other State defendants.

The Supreme Court in Imbler v. Pachtman, 44 U.S.L.W. 4250 (3/2/76), found a prosecutor to be absolutely immune from suit in the face of allegations that the prosecutor had obtained a conviction by knowingly using false evidence at trial and knowingly suppressing material evidence. Imbler ruled that absolute immunity attaches whenever a prosecutor's activities were "intimately associated with the judicial phase of criminal process", even though the activities may have been dishonest or malicious. (44 U.S.L.W. at 4256). Plea bargaining is certainly part of the judicial process and is within the scope of the prosecutor's duties; it follows that Mackell and Ludwig are immune from suit for their alleged improprieties in their plea bargaining with Palermo. Imbler is completely dispositive of the issue.

The absolute immunity approved by the high Court in Imbler is grounded on principles of public policy. As stated by the Supreme Court: "The alternative of qualifying a prosecutor's immunity would disserve the public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." Imbler, at p. 4256.

It is settled beyond doubt in this Circuit that a prosecutor is immune from suit under 42 U.S.C. § 1983 for acts performed in his official capacity. In Fanale v. Sheehy, 385 F. 2d 866, 868 (2d Cir. 1967), the Court held that where the complaint's allegations as to the district attorney are confined to official action, he is entitled to immunity. Accord, Dacey v. New York County Lawyers Association, 423 P. 2d 188, 192 (2d Cir. 1969), cert. denied, 398 U.S. 929 (1970). Prosecutorial immunity is extended notwithstanding an allegation that pure spite motivated the prosecutor, Yasselli v. Goff, 12 F. 2d 396 (2d Cir. 1926), affd. 275 U.S. 503 (1927) (per curiam), or an allegation that the prosecutors "conspired together and maliciously and wilfully entered into a scheme to deprive plaintiff of liberty." Gregoire v. Biddle, 177 F. 2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). Judge Learned Hand stated in Gregoire that prosecutorial immunity is extended no matter what malicious and spiteful animus motivated the actions.

The principle of Gregoire has been continuously reaffirmed by the courts in this Circuit in cases where the complaints contained allegations of gross indignities and egregious violations of the plaintiff's constitutional rights.

Corby v. General Motors Corp., 373 F. Supp. 967 (S.D.N.Y. 1974) (complaint alleged that prosecutors consipired with private persons to obstruct justice by giving away plaintiff's repossessed auto after releasing it from official custody and basing prosecution on perjured testimony); Fowler v. Vincent, 366 F. Supp. 1224 (S.D.N.Y. 1973) (allegation that prosecutor's investigation of assault incident in correctional facility violated plaintiff's right to due process); Rego Trading Corp. v. Birns, 361 F. Supp. 1341 (S.D.N.Y. 1973) (complaint alleged illegal search and seizure pursuant to a search warrant issued without probable cause and based on a false affidavit); Williams v. Halpern, 360 F. Supp. 554 (S.D.N.Y. 1973) (allegation that prosecutors conspired to deny plaintiff's constitutional rights in the prosecution).

In view of Imbler, it is respectfully submitted that the issue is conclusively resolved in favor of defendants and that any intimation in Judge Mansfield's lower court opinion (323 F. Supp. at 485), that given some circumstances the cloak of immunity could be pierced, must now be regarded as overruled. In any event, Judge Mansfield correctly ruled that the amended complaint did not allege such circumstances.

In this connection, Palermo's blatant attempt to have the issue judged by the purported evidence below, than the facial allegations of the amended complaint is obviously improper and must be rejected.

In sum, Mackell and Ludwig are immune from suit, and the amended complaint was properly dismissed.

CONCLUSION

THE COMPLAINT WAS PROPERLY DISMISSED AS AGAINST MACKELL AND LUDWIG IN 1971. MACKELL AND LUDWIG ARE IMMUNE FROM SUIT.

Dated: New York, New York
July 16, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
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Attorney for State
Defendants-Appellees

RALPH McMURRY
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of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Ralph McMurry, being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for defendant-appellee herein. On the 16th day of July, 1976, he served the annexed upon the following named person :

Nancy Rosner
401 Broadway
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Harry Simmons, Esq
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William Wells, Esq
Corp Counsel 15th
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Attorney in the within entitled by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by them for that purpose.

Ralph J. McMurry

Sworn to before me this
16th day of July, 1976

Assistant Attorney General
of the State of New York